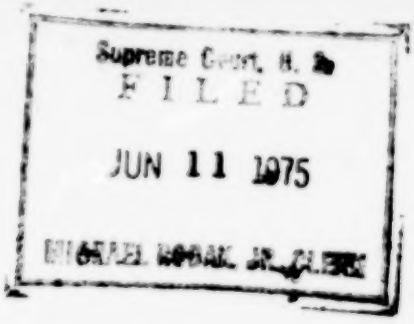

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

74-1532

No. A-812

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
(Two Volumes)

RICHARD ANTHONY JOHNSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004

Counsel for Petitioner

VOLUME II

Pages 88 - 172

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[62]

Phoenix, Arizona
Date: March 5, 1969
Escrow No. 02013111-7
Office: Main Office

James Stewart Company,
M. Seth Horne and Maurine D. Horne
c/o Wallace Tanner, Atty.
Suite 913, 3800 N. Central
Phoenix, Ariz. 85012

and
Transamerica Title Insurance Company
Escrow Agent

Gentlemen:

The instructions in the above numbered escrow having been dated October 9, 1968, and more than the time limit allowed therein having elapsed since said date, and ~~Seller~~ (Buyer) named in said escrow instructions having failed to comply with the terms thereof, the undersigned elects to cancel the escrow.

The undersigned, therefore, delivers this notice to the Escrow Agent demanding that if ~~Seller~~ (Buyer) has not complied with all of the terms of said escrow instructions within thirteen days from the date of receipt of this notice by the said Escrow Agent, said escrow shall thereupon become cancelled.

Notwithstanding any of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under a cancellation notice shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as

payment in these circumstances unless approved by the party seeking cancellation. Compliance shall be met at the office shown above.

Yours very truly,

/s/ FRANCIS M. COCKE

Received by Transamerica Title Insurance Company this 5 day of March , 1969.

/s/ H. KAVANAUGH
Escrow Officer

Form B-7 Rev. 1-68

[63]

TRANSAMERICA TITLE INSURANCE COMPANY

Date: March 6 1969

Escrow No. 02013111-7

JAMES STEWART COMPANY
C/o Wallace Tanner, Attorney
Suite 913
3800 North Central Ave.
Phoenix, Arizona 85012

Gentlemen:

The (Seller) (~~Buyer~~) under the above numberedescrow has today served us with a notice of cancellation thereof, an executed copy of which is enclosed.

Such notice having been given, you must comply with all of the terms of the escrow on or before March 19 1969, otherwise, as Escrow Agent, we must comply with the enclosed notice and the demands therein made.

Very truly yours,

TRANSAMERICA TITLE
INSURANCE COMPANY

By /s/ H. Kavanaugh
Escrow Officer

Form B-13

[64]

TANNER, JARVIS, & OWENS
Attorneys at Law
913 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012

March 5, 1969

TRANSAMERICA TITLE INSURANCE CO.
114 West Adams
Phoenix, Arizona

Attention: Mr. H. Kavanaugh
Escrow Officer

Re: Escrow No. 02013111-7

Gentlemen:

There has previously been submitted to you the down payment due in October 1968 on the above excrow. This down payment in the sum of $44,000 was the balance remaining after payment of $20,000 which was paid to the sellers outside of escrow. Twenty thousand dollars of the $44,000 on deposit was also paid directly to Francis M. Cocke to apply on his share of the down payment. It is my understanding that Mr. and Mrs. Cocke have reached an agreement as to the way these funds are to be distributed and also an agreement as to the distribution of the $64,000 payment which will be due upon this escrow being closed. According to the information we have received, they have agreed to a split of $32,000 to each of the parties. The only matter which seems to be in contention is whether Mrs. Cocke will receive

the payment directly or whether the payment will be set up in some kind of trust agreement. It is apparently the position of Mrs. Cocke that the payment is to be made to her directly and it is apparently the position of Mr. Cocke that the payments are to be maintained in some sort of trust arrangement. The buyers are not directly concerned with how Mr. and Mrs. Cocke make this division; however, the buyers are vitally concerned that some arrangement be made so that the escrow can close and and a means be provided for crediting sums to the purchase price and a means provided for obtaining parcel releases as required by the buyers.

Releases have been provided for all the acreage except parcels 1A and 2A which we understand are to be deeded to the buyers at close of escrow. The parcel releases properly executed by both Francis M. Cocke and Joan H. Cocke are to be held by the title company and released to the buyers [65] as payments are made to the First National Bank of Arizona.

Enclosed you will find the buyer's checks each in the sum of $32,000 made payable to the First National Bank of Arizona in conformity with the agreement made by Mr. and Mrs.Cocke concerning the distribution of the funds from this payment. You are authorized to deliver these sums to the First National Bank when you have accomplished the following:

1. Closed the escrow in conformity with the original agreement. Buyers' funds have been on deposit for many months and the only reason that this escrow has not been closed has apparently been the inability of the sellers to agree how pay-

ment will be distributed. This was not part of the original agreement since the buyers assumed no responsibility for this item.

2. Issued your standard title insurance policy in conformity with the agreement to the buyers.

3. Have in your possession ready for delivery to buyers each of the partial releases of mortgage submitted to you.

4. Have recorded the deeds and mortgages which deed is to include a deed to parcels 1A and 2A to the buyers.

5. Have instructions from the sellers in your possession which assures you and the buyers that upon payment by the buyers of payments hereunder that these sums will be accepted by First National Bank in conformity with the agreement and that the First National Bank will issue receipts which will be acceptable to Transamerica to apply toward release credits herein.

As stated previously, the buyers do not want to become involved in any conflict between the sellers and do not desire to take a position in any way regarding their internal handling of the payments. In conformity with the instructions which have been received and the contract, there is herewith submitted to you three (3) promissory notes and three (3) mortgages which reflect the balance due to the sellers after the annual payment which is submitted herewith. If the sellers do not desire to have the mortgages and promissory notes in the sums set forth herein or have any changes which [66] are acceptable to the title company

and to the First National Bank and which do not in any way affect buyers' rights under the agreement, buyers will be glad to cooperate in any way in accomplishing the result desired by the sellers.

If you have any questions please contact our attorney Wallace O. Tanner, 913 Del Webb Building, Phoenix, Arizona 85012.

Very truly yours,

/s/ M. S. Horne
M. S. Horne
/s/ Maurine D. Horne
Maurine D. Horne

Received this 7th day of March 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

Deposited in the United States Mail
this 10th day of March, 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

[67]

TRANSAMERICA TITLE INSURANCE COMPANY

March 10th, 1969
Escrow #02013111-7

Mr. Francis Cocke
1320 South Priest Road
Tempe, Arizona

Dear Mr. Cocke:

Enclosed is a letter that we have received from the Buyer relative to the above numbered escrow. Also, this is to acknowledge that we have received the various checks and documents mentioned in said letter.

It appears to the undersigned that the Buyer has done everything that is required of him to close this escrow.

Yours very truly

/s/ H. KAVANAUGH
Escrow Officer

HK/L

c.c.- Joan H. Cocke
Attention: Loretta Whitney

c.c - Arleigh R. Burton
130 East 14 Street
Tempe, Arizona

c.c - Walace O. Tanner
913 Del Webb Building
Phoenix, Arizona

[68]

November 27, 1972

Mr. Ray Martin, Manager,
Home Office Escrow Dept.
Transamerica Title Insurance Company
114 West Adams Street
Phoenix, ARizona 85003

Mrs. Loretta S. Whitney
Attorney-at-Law
603 Luhrs Building
Phoenix, Arizona 85003

Re: Escrow No. 02013111-7

Gentlemen:

This letter will confirm our agreement that the deposit this date of Thirty-Two Thousand and No/100 ($32,000.00) Dollars in the above-numbered escrow by James Stewart Co., an Arizona corporation, and M. Seth Horne and Maurine D. Horne constitutes full and complete compliance with regard to the second installment of $64,000.00 due under that contract dated October 9, 1968, and constitutes compliance to date of the obligation of said parties under and pursuant to the Judgment entered in James Stewart Co., an Arizona corporation, et al, vs Francis M. Cocke, C-222472, and a certain escrow with Transamerica Title Insurance Company Escrow No. 02013111-7.

It it further agreed by all the parties hereto that the deposit of said $32,000.00 represents the required sum to be deposited in escrow after offsets permitted and required by the aforesaid Judgment, and after due regard and calculation

of the equal one-half interest by Joan H. Cocke and Francis M. Cocke in the parcel to which the said $32,000.00 is to be applied.

It is further agreed by all of the parties hereto that the deposit of the aforesaid $32,000.00 with Transamerica Title Insurance Company is to be immediately re-deposited in a savings account with United Bank and to draw normal interest thereon at the rate of interest paid on ordinary savings accounts.

This deposit is being based upon the opinion of Kelly and Corbin, Lawyers, that the period for appeal for Francis M. Cocke expires at the conclusion of the business day, November 27, 1972. In the event the said Francis M. Cocke thereafter appeals from the aforesaid Judgment and is successful in sustaining appellate jurisdiction, then you shall release the $32,000.00 transmitted herewith pending Mr. Cocke's appeal.

JAMES STEWART CO., an Arizona Corportaion

M. SETH HORNE

MAURINE D. HORNE

By and through their Attorney:

/s/ Hubert E. Kelly
Hubert E. Kelly

JOAN H. COCKE

By and through her attorney:

/s/ Loretta S. Whitney
Loretta S. Whitney

TRANSAMERICA TITLE INSURANCE COMPANY

By and through its authorized agent:

/s/ Raymond B. Martin
Raymond B. Martin, Manager
Home Office Escrow Department

[69]

August 29, 1973

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Transamerica Title Insurance Company
P. O. Drawer 13028
Phoenix, Arizona 85002

Attention: Mrs. Marie Peipelman,
Escrow Officer

Attention: Mrs. Frances Bumsted Mitchell,
Legal Department

Re: James Stewart Co.,
M. Seth Horne and
Maurine D. Horne v.
Francis M. Cocke
Maricopa County,
Arizona,
Superior Court Cause
No. C-22472

Demand for Compliance with
Second Amended Judgment
Entered and filed by the
Superior Court of the
County of Maricopa on
September 27, 1972.

Gentlemen:

As you know, the plaintiffs in the above action were awarded judgment against Francis M. Cocke on September 27, 1972. This judgment provided, among other things, that the property which is the subject of your Excrow No. 02013111-7 be conveyed to the plaintiffs. From that judgment, de-

fendant Francis M. Cocke appealed, which appeal was dismissed on May 17, 1973. Thereafter, on June 13, 1973, the Court denied a motion for rehearing on its order dismissing the appellant's appeal dated May 17, 1973. From that order Mr. Cocke did not [70] file a petition for review within the time prescribed by Rule 47(b) of the Arizona Supreme Court Rules, and the litigation involving the property covered by your Escrow No. 02013111-7 is now concluded.

As you also know, in early January 1973, representatives of the plaintiffs were in your office, at which time they conferred with Mr. Martin, to whom this escrow was then assigned. And, at that time the plaintiffs deposited with Transamerica Title additional funds which were then deemed necessary by the plaintiffs and the agent of Transamerica Title to comply with the terms of the contract and escrow involved in this case in the event Mr. Cocke's appeal was untimely, as it was ultimately decided to be.

Upon conclusion of the litigation by the denial of the motion for rehearing and Mr. Cocke's failure to file a petition for review with the Supreme Court, representatives of encouraging Transamerica Title to proceed with the closing of the escrow. Thereafter, on July 17, 1973, July 31, 1973, and August 14, 1973, the undersigned, as counsel for the James Stewart Co., M. Seth Horne and Maurine D. Horne, his wife, directed correspondence to you urging you to comply with your contractual obligations and proceed with the closing of this escrow without further delay.

I have recently been informed by Mr.

Powell B. Gillenwater, the attorney for Transamerica Title Insurance Company, that it is your position that you will not comply with your contractual obligations by closing Escrow No. 02013111-7 even though there is a valid existing judgment of the Superior Court of Arizona in favor of the above plaintiffs directing, among other things, that they are to receive conveyance of the property which is the subject of this escrow.

As counsel for the above-named plaintiffs, I hereby demand that you proceed to honor your contractual obligations and close Escrow No. 02013111-7. In the event you do not take action immediately, I will proceed on behalf of the plaintiffs for such relief as is permissible in the [71] premises under Rules 70 and 71 of the Arizona Rules of Civil Procedure. Furthermore, I will hold Transamerica Title Insurance Company responsible for any and all damages resulting to James Stewart Co. and M. Seth Horne and Maurine D. Horne, his wife, or any of them, by reason of your unilateral failure to honor the contractual obligations of Escrow No. 02013111-7.

Very truly yours,

HEK:lh
cc: Mr. Powell B. Gillenwater
Browder & Gillenwater
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

[72] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	No. C 222472 SUMMARY JUDGMENTS (Filed: 11/10/70)

This matter having come on regularly to be heard on October 22, 1970, on the motion of Transamerica Title Insurance Company for summary judgment in its favor on the counterclaim of Francis M. Cocke, and for Transamerica's motion for summary judgment in its favor against the defendant Cocke for Attorney's fees and costs incurred by Transamerica; and the defendant Cocke having been present in person and both parties having been represented by counsel, and extensive memoranda having been filed herein, and the Court having reviewed the same and having heard oral argument in reference to both motions, and the Court having held an additional hearing on October 22, 1970, for the purpose of determining the amount of reasonable

attorney's fees and costs due Transamerica Title Insurance Company and determining the motion for rehearing of Francis M. Cocke, and evidence having been presented as to the necessity and reasonableness of attorney's [73] fees incurred, and the oral argument having been presented on the motion for rehearing, and the Court being fully advised in the premises, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that there are no genuine issues of fact and that Transamerica Title Insurance Company is entitled to and hereby is awarded summary judgment against the defendant Francis M. Cocke on his counterclaim against Transamerica Title Insurance Company. It is

FURTHER ORDERED, ADJUDGED AND DECREED that there is no genuine issue of fact except as to the amount of attorney's fees, which has been determined at a hearing provided therefor, and that Transamerica Title Insurance Company is entitled to summary judgment on its counterclaim against the defendant Cocke for attorney's fees in the amount of $4,568.00 and its partial costs incurred herein in the amount of $104.71, and Transamerica Title Insurance Company is hereby granted leave to file a statement of costs for depositions and other costs incurred in connection with this action after the entry of this formal written judgment. It is

FURTHER ORDERED, ADJUDGED AND DECREED that the motion for rehearing filed herein by the defendant Cocke in reference to the summary judgments herein provided be and the same hereby is denied. It is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just reason for delay in the entry of this judgment, and the Court does hereby pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED this 10th day of November, 1970.

s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

[74]
The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this 22nd day of October, 1970, and copies thereof delivered to the following on the 22nd day of October, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 N. Macdonald
Mesa, Arizona 85201

Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem
of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

s/ Powell B. Gillenwater
Powell B. Gillenwater

[75] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	)	No. C 222472 (Filed: Nov 1970)

JUDGMENT IN FAVOR OF CROSS-DEFENDANT, JOAN H. COCKE AND AGAINST CROSS-CLAIMANT FRANCIS M. COCKE

This matter having come on regularly to be heard on September 2, 1969, and the Court having ordered that the motion of the defendant, Joan H. Cocke, to dismiss the cross-claim of the defendant, Francis M. Cocke, on the grounds of lack of jurisdiction and failure to state a claim shall be held in abeyance until the amended pleading by the defendant, Francis M. Cocke, has been filed; and Joan H. Cocke having been allowed ten (10) days after the filing of the amended pleading by the defendant, Francis M. Cocke, to file any response to the amended pleading filed by the defendant, Francis M. Cocke; and

the defendant, Francis M. Cocke, having failed to amend his cross-claim against the cross-defendant, Joan H. Cocke; and Joan H. Cocke having filed a new motion for judgment in her favor as cross-defendant and against the cross-claimant, Francis M. Cocke, on the 2nd day of October, 1969; and the Court having ordered that said new motion be heard on November 20, 1969, and said hearing having been duly continued by said Court to November 28, 1969; and said hearing on the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and [76] against the cross-claimant, Francis M. Cocke, having come on regularly for hearing with the motions of other parties in said action on November 28, 1969; and all parties being present and additional memorandums being filed by cross-claimant, Francis M. Cocke, and oral arguments having been heard on said date, the Court took under advisement the motion for judgment of the cross-defendant, Joan H. Cocke, in her favor and against the cross-claimant, Francis M. Cocke; and on December 1, 1969, the Court being fully advised in the premises entered an Order granting the motion for judgment in favor of the cross-defendant, Joan H. Cocke and against the cross-claimant, Francis M. Cocke,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and against the cross-claimant, Francis M. Cocke, be, and the same hereby is, granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just

reason for delay in the entry of this judgment, and the Court does hereby, pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED THIS ____ day of November, 1970.

/s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this ____ day of November, 1970, and copies thereof delivered to the following on the _____ day of November, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 North Macdonald
Mesa, Arizona 85201

[77]
Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Powell B. Gillenwater
Browder Gillenwater & Daughton
Attorney for Transamerica Title
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

George Sorrenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem

of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

Loretta S. Whitney

[78] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants. vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	No. C 222472 (Filed: 7/26/72)

PLAINTIFFS' AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND SECOND AMENDED JUDGMENT

COMES NOW the Plaintiffs, and pursuant to the order of this Court dated April 20, 1972, submits hereby its amended proposed finds of fact, conclusions of law and second amended judgment.

FINDINGS OF FACT

The Plaintiffs propose that the Court make, from the evidence, the following findings of fact.

1. On October 9, 1968, JAMES STEWART COMPANY, hereinafter referred to as STEWART, entered into a real estate contract and

escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

[79] 2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for that portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time

after January 2, 1970.

5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendant COCKE and JOAN H. COCKE $20,000 and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 of which $20,000 was [80] paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or any time thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to convey as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to convey, and are costs which were preliminary to the development of the property, and are no longer usuable or otherwise recoverable by Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

14. However, since December 8, 1970, COCKE has refused and still refuses to convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

CONCLUSIONS OF LAW

The Plaintiffs propose that the Court make the following [81] conclusions of law:

1. That Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiffs' motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four and 86/100 Dollars ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plantiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three and 51/100 Dollars ($1,463.51).

Respectfully submitted,
KELLY and CORBIN
By
/s/ Hurbert E. Kelly
Hubert E. Kelly
3003 N. Central
Suite 2300
Phoenix, Arizona 85012
Attorneys for Plaintiffs

Copy of the foregoing lodged with the Court this 26th day of July, 1972, and mailed same date to:

Powell B. Gillenwater
Browder & Gillenwater
Attorneys for Transamerica Title

3003 N. Central, Suite 2304
Phoenix, Arizona 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
Attorney for Dorothy H. Cocke
and Elizabeth C. Cocke
609 Luhrs Building
Phoenix, Arizona 85003

L. Alton Riggs, Jr.
Attorney for F. M. Cocke
48 N. Macdonald Street
Mesa, Arizona 85021

s/Hubert E. Kelly
Hubert E. Kelly

[83] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMAPNY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants. vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendants on Counterclaim.	No. C 222472 (Filed: 9/27/72)

SECOND AMENDED JUDGMENT

This cause seeking specific performance of an agreement for the purchase and sale of certain real estate located in the State of Arizona, County of Maricopa, legally described as:

PARCEL NO. 1: That part of the East half of the South east quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said

East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the [84] George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of

Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

a copy of said agreement being attached to the complaint, and damages, the specific performance having been granted by the Court on December 8, 1970, against the Defendant FRANCIS M. COCKE upon the Plaintiff's motion for summary judgment, and the question of damages coming on regularly for trial before the Court sitting without a jury, commencing on the 28th day of February, 1972, Plaintiffs appearing by their attorneys, HUBERT E. KELLY and CHARLES L. ARNOLD, the Defendant FRANCIS M. COCKE appearing by and through his attorney, L. ALTON RIGGS, JR., and the Defendant JOAN H. COCKE appearing by and through her attorney, LORETTA WHITNEY, and the Court having heard the testimony and having examined the proof offered by the respective parties, and having taken this matter under [85] advisement finds, to-wit:

1. On October 9, 1968, JAMES STEWART COMPANY hereinafter referred to as STEWART, entered into a real estate contract and escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the Contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not

more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for the portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time after January 2, 1970.

[86] 5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendants COCKE and JOAN H. COCKE $20,000 [87] and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 on which $20,000 was paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or anytime thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to perform the agreement for the purchase and sale and convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to perform the agreement for the purchase and sale and convey the property as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to perform the agreement for the purchase and sale, and convey the said land as provided by the contract, and are costs which were preliminary to the development of the property, and are no longer usable or otherwise recoverable by

Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

[88] 14. However, since December 8, 1970, COCKE has refused and still refuses to perform the agreement for the purchase and sale and convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

And the Court further finds as conclusions of law the following:

1. The Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiff's motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plaintiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:

PARCEL NO. 1: That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

[89] BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of

said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from

the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23

feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), said amount being for:

[90] CONSULTING AND ARCHITECTURAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), plus interest as provided by law until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-four Thousand Dollars ($64,000) repre-

senting the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of [91] suit herein, viz: Forty-seven Thousand Four Dollars and Eight-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as

provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said [92] contract as modified hereby.

DONE IN OPEN COURT this 27th day of September, 1972.

/s/ Irwin Cantor
Judge of the Superior Court

Copy of the foregoing Second Amended Judgment lodged with the Court this 26th day of July, 1972, and mailed on same date to:

Powell B. Gillenwater
Browder & Gillenwater
Attorneys for Transamerica Title
3003 N. Central, Suite 2304
Phoenix, AZ 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, AZ 85003

George Sorenson, Jr.
Attorney for Dorothy H. Cocke
and Elizabeth C. Cocke
609 Luhrs Building
Phoenix, AZ 85003

L. Alton Riggs, Jr.
Attorney for F. M. Cocke
48 N. Macdonald Street
Mesa, AZ 85201

/s/ Herbert E. Kelly

[93] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	)	No. C 222472 (Filed: 9/7/73)

APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, FOR AN ORDER REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, pursuant to Rules 70 and 71 of the Arizona Rules of Civil Procedure, hereby make application for a writ of assistance, or, in the alternative, for an order requiring compliance with the judgment entered by this Court on September 27, 1972, or for a supplemental bill enforcing said judgment, and respectfully state unto the Court as follows:

1. On September 27, 1972, this

Court entered and filed its Second Amended Judgment in the above-captioned action, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference as though fully set forth.

2. Said action arose out of defendant Francis M. Cocke's refusal to specifically perform a contract entered into on October 9, 1968, between James Stewart Company as buyer and Francis M. Cocke and Joan H. Cocke as sellers, a copy of which is attached hereto as Exhibit "B" and incorporated herein by [94] reference as though fully set forth; and Escrow No. 02013111-7, a copy of which is attached hereto as Exhibit "C" and incorporated herein by reference as though fully set forth.

3. The judgment referred to in Paragraph 1 above (hereinafter referred to as "the judgment") provided, inter alia, as follows:

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:
>
> "PARCEL NO. 1 That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range

> Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:
>
> BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

"PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the [95] middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481. 97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence

South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning."

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86), said amount being for:

"CONSULTING AND ARCHITECTURAL FEES - $ 6,349.00

"SALARIES AND OFFICE OVERHEAD - $18,895.86

"INTEREST ON MONEY IN PROJECT - $21,760.00

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), plus interest as provided by law until paid.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-Four Thousand Dollars ($64,000), representing the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid; [96]

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-Four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the

Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73 (b) of the Arizona Rules of Civil Procedure.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE

shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby."

(Emphasis added.)

4. On October 10, 1972, defendant FRANCIS M. COCKE filed with this Court a motion to vacate the judgment, which motion was denied by the court on November 6, 1972, and the denial of such motion reaffirmed on November 8, 1972. [97]

5. On November 27, 1972, plaintiffs, in compliance with the judgment, contract and Escrow No. 02013111-7, paid over to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, the sum of $32,000 representing the balance of the second installment of $64,000 due from plaintiffs on January 2, 1969, after offsetting against the interest therein of FRANCIS M. COCKE the sum of $32,000 for the damages and costs awarded plaintiffs against defendant FRANCIS M. COCKE as set forth in the judgment.

6. On January 4, 1973, defendant FRANCIS M. COCKE filed a notice of appeal from the judgment entered on September 27, 1972, with the Clerk of the Court, and on January 8, 1973, plaintiffs filed their notice of cross appeal from the judgment.

7. On March 7, 1973, plaintiffs filed their motion to dismiss the appeal of defendant FRANCIS M. COCKE on the grounds that said appeal was untimely, and on May 17, 1973, the Court of Appeals of the State of Arizona dismissed the appeal of defendant FRANCIS M. COCKE on those grounds. Thereafter, on June 13, 1973, the Court of Appeals denied a motion for rehearing filed by defendant FRANCIS M. COCKE from the order of that Court of May 17, 1973, dismissing his appeal. On July 5, 1973, the Court of Appeals dismissed the cross appeal filed by plaintiffs on its own motion. Attached hereto and marked as Exhibits "D," "E" and "F," respectively, and incorporated herein as though fully set forth, are copies of the orders entered by Division One of the Court of Appeals for the State of Arizona on May 17, 1973, June 13, 1973, and July 5, 1973. Defendant FRANCIS M. COCKE did not thereafter file a petition for review with the Supreme Court of Arizona from the order of the Court of Appeals of June 13, 1973, within the time prescribed by Rule 47 (b) of the Rules of the Supreme Court of Arizona, nor did plaintiffs file a petition for review from the order of the Court of Appeals of July 5, 1973, within such time. [98]

8. After the expiration of the period of time for defendant FRANCIS M. COCKE to file a petition for review with the Supreme Court of Arizona, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel

for defendant FRANCIS M. COCKE, for the purpose of inquiring whether defendant FRANCIS M, COCKE would proceed to close Escrow No. 02013111-7 in compliance with the judgment, and plaintiffs' counsel was informed that defendant FRANCIS M. COCKE was farming in New Mexico and that his counsel did not know whether or not he intended to comply with the judgment. Thereafter, on July 17, 1973, July 31, 1973, and August 14, 1973, counsel for plaintiffs sent letters to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, requesting that said counterdefendant proceed with the closing of said escrow. Attached hereto and marked as Exhibits "G," "H" and "I," respectively, are copies of the aforementioned letters which are incorporated herein by reference as though fully set forth. On August 21, 1973, at a conference attended by counsel and the agent for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and counsel for plaintiffs, counsel for plaintiffs was informed that counterdefendant would not proceed to close Escrow No. 02013111-7 in compliance with the judgment. Also on said date, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel for defendant FRANCIS M. COCKE, and requested that counsel obtain the authorization of defendant FRANCIS M. COCKE for counterdefendant to proceed with the closing as required by the judgment, at which time counsel for defendant FRANCIS M. COCKE refused to call defendant FRANCIS M. COCKE for such purpose. Thereafter, on August 29, 1973, counsel for plaintiffs was informed by Mr. Powell B. Gillenwater, counsel for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, that said counterdefendant would not proceed to close Escrow No. 02013111-7 without (1) authorization of defendant FRANCIS M. COCKE to do so [99] or (2) an order of this Court

requiring said counterdefendant to proceed to close said escrow in compliance with the judgment entered September 27, 1972.

9. On August 29, 1973, counsel for plaintiffs sent to defendant FRANCIS M. COCKE at his last known address, 1320 South Priest Road, Tempe, Arizona 85281, and in care of his attorney, Alton Riggs, at 1540 East University, Suite 200, Mesa, Arizona 85201, and to said Alton Riggs individually, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "J" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, postage prepaid. Also on August 29, 1973, counsel for plaintiffs sent to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, P. O. Drawer 13028, Phoenix, Arizona 85002, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "K" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, póstage prepaid.

10. There is presently pending in the Court of Appeals of the State of Arizona, Division One, an appeal by defendant FRANCIS M. COCKE against counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, under Docket No. 1 CA-CIV 2306, in which appeal defendant FRANCIS M. COCKE is appealing a judgment entered by this Court on

November 6, 1972, in which appeal the defendant, FRANCIS M. COCKE, continues to question the propriety in which Escrow No. 02013111-7 was handled by counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and said appeal [100] has not as of the date of filing of this application been concluded.

11. Inasmuch as the appeal by defendant FRANCIS M. COCKE from the judgment entered against him on September 27, 1972, in favor of plaintiffs has now been concluded and by reason of the refusal of defendant FRANCIS M. COCKE to comply with said judgment, and, further, by reason of the refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed to close Escrow No. 02013111-7, plaintiffs are now being placed in the position of being unable to further comply with the terms of said judgment and, indeed, are being deprived of the property rights awarded to them under the judgment dated September 27, 1972.

12. In the opinion of plaintiffs, it is necessary and proper that a writ of assistance requiring counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of September 27, 1972, or an order or such other supplemental bill or writ, be issued to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, or such other proper officer, directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9, 1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

Such writ of assistance, order or supplemental bill, or such other writ as deemed necessary and proper in the premises, should comply with the terms of the aforesaid contract and escrow instructions, except as modified by the judgment of the Court entered on September 27, 1972, and should provide plaintiffs with such relief as is necessary to effectuate the closing of the escrow in accordance with the terms of the aforesaid contract and [101] escrow instructions as modified by the judgment, including but not limited to the appointment of such person or officer of the Court to do any and all things necessary for compliance with the terms of the aforesaid contract and escrow instructions, specifically including the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of Escrow No. 02013111-7. In the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided for by said escrow instructions, as set forth in the last paragraph of Schedule "A" attached and made a part of Escrow No. 02013111-7, then such writ, order or other supplemental bill or writ should provide for the appointment of some other depository to act for such purpose, or provide for the note and mortgage to be held by the Clerk of the Court and payments thereon to be received by the Clerk for distribution to defendants according to their respective interests.

13. In the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7, the

writ of assistance herein requested, or such other order, supplemental bill or writ as the Court deems necessary and proper in the premises, should provide for the appointment of a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions as modified by the judgment and to be substituted with the rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, The TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated to plaintiffs its willingness to be appointed as such substitute [102] escrow agent to act for and instead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, pursuant to order of Court, said TITLE INSURANCE COMPANY OF MINNESOTA to be substituted with the rights, duties and privileges of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, as set forth in the contract dated October 9, 1968, and Escrow No. 02013111-7 dated October 9, 1968, as modified by the judgment dated September 27, 1972, and such instructions as are issued by the Court in such writ, order or supplemental bill or writ as may be issued by the Court.

WHEREFORE, plaintiffs pray as follows:

1. That a writ of assistance, or an order, or such other supplemental bill or writ, be issued out of this Court ordering counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of this Court entered on September 27, 1972, and directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9,

1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

2. That such writ of assistance, or order, or such other supplemental bill or writ as deemed necessary and proper by the Court in the premises, should direct compliance with the terms of the contract and escrow instructions dated October 9, 1968, except as modified by the judgment of the Court entered on September 27, 1972, and provide plaintiffs with such relief as is necessary to effectuate the closing of Escrow No. 02013111-7 in accordance with the terms of the aforesaid contract and escrow instructions as modified by the judgment of September 27, 1972, including but not limited to the appointment of such person or persons, officer or officers of the Court to do any and all things [103] necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, specifically providing that the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7 be performed.

3. In the alternative, in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by said escrow instructions, that the Court appoint some other depository to act for such purpose, or direct that the note and mortgage be held by the Clerk of the Court and payments thereon be made to the Clerk

for distribution to defendants according to their respective interests.

4. In the alternative, in the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7 as directed by such writ of assistance, order or such other supplemental bill or writ as shall issue from this Court, that the Court appoint as an officer of this Court a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions No. 02013111-7, as modified by the judgment entered September 27, 1972, and to be substituted with all rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY.

5. For such other and further relief as the Court deems necessary and proper in the premises.

Respectfully submitted, [104]

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
Attorney for Plaintiffs

[105] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant On Counterclaim.	No. C 222472 Filed: 10/31/73

ORDER GRANTING APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

The verified Application for Writ of Assistance, or, Alternatively, for an Order Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing said Judgment coming on regularly to be heard pursuant to the Order to Show Cause issued by this Court on September 7, 1973, notice of said hearing and the continued hearing having been duly given to each of the defendants herein, and the same having been heard in open court on October 12, 1973, with the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH

HORNE and MAURINE D. HORNE, his wife, being represented by their attorney, HUBERT E. KELLY; the defendant JOAN H. COCKE, a divorced woman, being represented by her attorney, LORETTA S. WHITNEY; the defendant TRANSAMERICA TITLE COMPANY, successor by change of name to TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, being represented by its attorney, POWELL B. GILLENWATER; and the defendant FRANCIS M. COCKE, a divorced man, neither appearing in person nor by counsel; and the Court having taken the same under advisement on October 12, 1973; and it appearing [106] to the Court that the allegations set forth in the said verified application are true and correct and that this Court has jurisdiction to grant the relief sought in the said verified application; and

IT FURTHER APPEARING upon representation by counsel for the defendant TRANSAMERICA TITLE CO. that said defendant is no longer willing to act as escrow agent of Escrow No. 02013111-7 and close said escrow in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, or in any manner act in connection with the said escrow or the closing thereof; and

IT FURTHER APPEARING to the Court that the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated its willingness to be appointed pursuant to order of this Court to act for and in the place and stead of the defendant TRANSAMERICA TITLE CO. for the purpose

of closing said Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, and such instructions as are issued by the Court pursuant to this proceeding; and

IT FURTHER APPEARING, after considering the said verified application, the exhibits filed and the oral arguments of counsel at the hearing in open court, that the relief sought in the said verified application should be granted;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, are entitled to have Escrow No. 02013111-7 closed in accordanc with the [107] contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, and that a writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment be, and it is hereby, issued by this Court and directed to the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, appointing and commanding said Title Insurance Company of Minnesota to act in the place and stead of the defendant TRANSAMERICA TITLE CO. as the escrow agent for the purpose of proceeding with and closing Escrow No. 02013111-7, or such other number

which said escrow may hereafter be assigned by Title Insurance Company of Minnesota, in accordance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, substituted as escrow agent with all of the rights, privileges and duties of the defendant TRANSAMERICA TITLE CO. for the purpose of proceeding with and closing Escrow No. 02013111-7, all as set forth in the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, appointed as an officer of this Court to do any and all acts deemed necessary and proper to effectuate the closing [108] of Escrow No. 02013111-7 in accordance with the terms of the aforsaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, including but not limited to any and all acts and things necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, and specifically those provisions set

forth in Paragraphs 1 and 3 of the aforesaid contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the officer of this Court pursuant to Rule 70 of the Arizona Rules of Civil Procedure, be, and it is hereby, authorized to execute all documents for and on behalf of and in the name of FRANCIS M. COCKE for the purpose of effectuating the closing of Escrow No. 02013111-7, including but not limited to the execution of a warranty deed or deeds to convey the property set forth in the judgment entered and filed by this Court on September 27, 1972, and such other documentation as is necessary to effectuate the closing of Escrow No. 02013111-7 and the transfer of legal title thereto to plaintiffs, or any of them, subject to compliance by the plaintiffs with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by [109] said escrow instructions dated October 9, 1968, then said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the appointed officer of this Court pursuant to Rule 70

of the Arizona Rules of Civil Procedure to effectuate the closing of Escrow No. 02013111-7, be, and it is hereby, appointed to hold said note and mortgage and to collect and deposit the proceeds thereof, as the same may be paid to it under the terms thereof, in such savings accounts or time certificates of deposit in any national banking association or federal savings and loan association in Phoenix, Arizona, as it deems best and desirable; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment issued pursuant to this order be also directed to the Sheriff, County of Maricopa, State of Arizona, commanding such officer, upon compliance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, to remove the defendant FRANCIS M. COCKE from such portion or portions of said property as described in the judgment entered and filed by this Court on September 27, 1972, as is necessary, upon the aforesaid compliance by the plaintiffs herein, and to deliver possession of said portion or portions of said property to the plaintiffs; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant TRANSAMERICA TITLE CO. be, and it is hereby, directed to deliver, transfer and set over all documents, moneys, deposits, deeds, forms of deed and such other instruments as are

contained in Escrow No. 02013111-7 to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, for the purposes of effectuating this [110] order and the writ issued pursuant hereto; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the law of this case, the defendant TRANSAMERICA TITLE CO. is authorized to pay to itself from all sums on hand in Escrow No. 02013111-7, to the extent of the interest of Francis M. Cocke therein, all unreimbursed attorney's fees, costs, escrow fees, trust fees, transfer fees and any and all other expenses incurred in connection with said escrow and the transfer of said escrow to said Title Insurance Company of Minnesota, pursuant to this order.

DONE IN OPEN COURT this 31st day of October 1973.

/s/ Irwin Cantor
JUDGE

APPROVED:

TRANSAMERICA TITLE CO.
By
/s/ Frances Bumsted
FRANCES BUMSTED

[111]

IN THE SUPERIOR COURT OF THE STATE OF ARIZ.
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife,	
Plaintiffs,	
v.	No. C-222472
FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman,	Filed: 10/31/73
Defendants,	
v.	
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation,	
Additional Defendant on Counterclaim.	

WRIT OF ASSISTANCE
OR, ALTERNATIVELY,
ORDER, REQUIRING COMPLIANCE
WITH JUDGMENT DATED
SEPTEMBER 27, 1972,
OR SUPPLEMENTAL BILL
ENFORCING SAID JUDGMENT

To: TITLE INSURANCE COMPANY OF MINNESOTA,
a Minnesota corporation
3003 North Central Avenue
Phoenix, Arizona; and

SHERIFF, COUNTY OF MARICOPA, STATE OF ARIZONA

G R E E T I N G:

WHEREAS, by judgment of this Court entered and filed on September 27, 1972, a certified copy of which is attached hereto as Exhibit "A", it was, among other things, adjudged and decreed that the above-captioned plaintiffs were entitled to specific performance by the defendant FRANCIS M. COCKE of a certain contract and escrow instructions entered into on October 9, 1968, between the plaintiff JAMES STEWART CO. as buyer and FRANCIS M. COCKE and JOAN H. COCKE as sellers, and such other and further relief as set forth in said judgment dated September 27, 1972; and

WHEREAS, by order of this Court on October 31, 1973, a certified copy of which is attached hereto as Exhibit "B," it was ordered that a writ of assistance, order requiring compliance with judgment dated September 27, 1972, or supplemental bill [112] enforcing said judgment be issued to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, to effectuate the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973; and tothe SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, to put said plaintiffs in possession of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and to maintain and defend their possession upon their compliance with the terms of the aforesaid contract and escrow instruc-

tions entered into on October 9, 1968, as modified by the judgment dated Sepetmber 27, 1972, and the order dated October 31, 1973;

NOW, THEREFORE, TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, is commanded that, immediately after receiving this writ, it obtain from TRANSAMERICA TITLE CO. possession of the files relating to Escrow No. 02013111-7, including all documents, deeds, deposits and instruments constituting a part of said escrow files, and proceed with the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, without delay; and the SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, is commanded that, upon compliance by the plaintiffs with the terms of the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, [113] to go to and enter upon such portion or portions of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said purchaser (the plaintiffs), and that the said Sheriff deliver to said purchaser or their assigns the possession of the land and premises without delay and maintain, keep and defend their possession according to the

tenor and true intent of the judgment dated September 27, 1972, and order of this Court dated October 31, 1973.

WITNESS, the HONORABLE IRWIN CANTOR, Judge of the Superior Court, State of Arizona, in and for the County of Maricopa, and the seal of said Superior Court, this 31st day of October, 1973.

/s/ Irwin Cantor
J U D G E

Attested by:
Wilson D. Palmer

By:
Carlyn R. Brennan
Deputy Clerk

[645]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCIS M. COCKE,

Plaintiff,

vs.

IRWIN S. CANTOR, EINO M. JACOBSEN, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANS-AMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON,

Defendants.

No. Civ. 74-20 Phx. WPC

Filed: 3/4/74

MEMORANDUM AND ORDER

This is an action under the Civil Rights Act, 42 U.S.C. §§ 1981 et seq.(1970). Jurisdiction is predicated on 28 U.S.C. § 1343 (3,4) (1970). Various defendants and groups of defendants have filed motions to dismiss or for summary judgment.

The action arises out of a real estate transaction and subsequent state-court litigation. The defendants are practically every party, attorney and judge who had anything to do with the case. The following is a summary of the [646] complex proceedings and the claims of the prolix complaint.

Plaintiff and defendant Joan Cocke made a property settlement agreement in 1964, pursuant to which a trust was established with First National Bank. They were divorced in 1967. Certain property in this district held by them and the trustee in varying interests was agreed to be sold in 1968 to James Stewart Company (or its nominee the defendants Horne), and is identified in the record as Parcels 1 and 2. Apparently the sale was to except a certain easement known as the Jenkins Ditch, designated parcels 1A and 2A. Defendant Transamerica Title was the escrow agent. After a series of events, including a dispute between the Cockes over payment instructions and refusal of plaintiff to execute certain documents, the buyers brought suit for specific performance of the sale agreement. James Stewart Co. v. Cocke, Civil No. C-222472 (Maricopa Cty., Arizona Super. Ct., filed Apr. 22, 1969).

In the meantime, the underlying payment dispute between the Cockes was litigated in post-divorce proceedings. Cocke v. Cocke, Civil No. D-89,833 (Maricopa Cty. Ariz. Super. Ct. Dec. 31, 1968 & Mar. 15, 1969), aff'd, 13 Ariz. App. 57, 474 P. 2d 64 (1970). The court there held Mr. Cocke estopped to assert the irrevocability of the trust, and found that the sale property had been placed outside the trust.

In a series of judgments, the trial court dismissed Cocke's counter- and crossclaims against his wife and other parties in the specific performance action. James Stewart Co. v. Cocke, supra (Nov. 10, 1970), aff'd sub nom. Cocke v. Transamerica Title Ins. Co., 16 Ariz. App. 556, 494 P. 2d 756 (1972). Finally it entered judg-

ment against Cocke on the [647] complaint and ordered the sale consummated. James Stewart Co. v. Cocke, supra (Sep. 27, 1972), appeal dismissed, No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). A more detailed but concise statement of the procedural facts and substantive issues appears in the two reported court of appeals decisions. While he proceeds here pro se, plaintiff was represented by counsel in the state litigation.

First, there is no question of this court's subject-matter jurisdiction. The complaint purports to state a claim for denial of due process and equal protection rights by individuals and by conspiracy. The judges are sued in their individual, not official, capacities, and the claim is therefore against "persons" within the meaning of the Act.

Second, exhaustion of remedies is not required in these cases, assuming arguendo that there are facts in the record to support that defense. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433 (1963).

Third, there is no indication that the court lacks jurisdiction over the person of any of the defendants. All the attacks on the jurisdiction of this court are therefore without merit.

If properly obtained in courts of competent jurisdiction, the state judgments underlying the claims in the present complaint are res judicata of the things there decided. That has nothing to do with the constitutional issues raised here, however, which were not litigated in state court. Indeed, this

court would not have jurisdiction of the underlying dispute by itself, for lack of diversity or federal question. The gravamen of the complaint is that the state judicial system was perverted by the defendants to result in the [648] judgments against plaintiff, in contravention of the fourteenth amendment. A finding of res judicata or collateral estoppel, in the context of this case, would bar redress on the very facts alleged to be the proximate cause of the constitutional harm.

Plaintiff's first attack is on the jurisdiction of the state courts to decide the real estate dispute. His premise for this contention is that the courts proceeded to judgment in the absence of "indispensable parties." It is well settled that the considerations in rule 19(b) are equitable, not jurisdictional. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733 (1968) (Footnote omitted); see Jacobs v. United States, 367 F. Supp. 1275, 1281-84 (D. Ariz. 1973).

Once this linchpin falls, plaintiff's complaint states no more that the history of a complex, sometimes confused litigation. Without reciting detail, but nevertheless reading the complaint with every intendment in its favor, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), it fails to demonstrate that the defendants used

the courts unequally against him, or that the process was a sham, or that any significant right was denied him without legal justification. It is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. It wholly fails to show any conspiracy. The complaint does not state a claim [649] under the Civil Rights Act. Scott v. California Supreme Court, 426 F. 2d 300 (9th Cir. 1970); Fed. R. Civ. P. 12 (b) (6).

It is unnecessary to reach the issue whether plaintiff must demonstrate membership in a class under one or more sections of the statute.

IT IS ORDERED:

1. The motions to dismiss for lack of subject matter jurisdiction by defendants Cantor, Jacobson and Donofrio, defendants Tanner, Kelly, Schneider, Title Ins. Co. of Minn,. James Stewart Co., Horne et ux. and Burton, and defendant Joan Cocke are denied. Fed. R. Civ. P. 12(b) (1).

2. The motions for summary judgment on the ground of res judicata by all defendants except Cantor, Jacobson, and Donofrio are denied.

3. The motion of defendants Cantor, Jacobson and Donofrio to dismiss on the ground of judicial immunity is granted.

4. The motions of all defendants to dismiss pursuant to Fed. R. Civ. P. 8, 12(b) (6) are granted.

5. The complaint and action are dismissed with prejudice.

DATED March 4, 1974.

/s/ Wm. P. Copple
United States District
Judge

UNITED STATES DISTRICT COURT

for the

District of Arizona

CIVIL ACTION FILE NO. 74-20 Phx. WPC

FRANCIS M. COCKE,

Plaintiff,

vs.

IRWIN S. CANTOR, et al;

Defendants.

JUDGMENT

This action came on for ~~trial (hearing)~~ consideration before the Court, Honorable Wm. P. Copple, United States District Judge, presiding, and the issues having duly ~~tried (heard)~~ considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and that action is dismissed with prejudice.

FILED

March 4, 1974

By /s/ P. T. Martin
Deputy Clerk

Dated at Phoenix, Arizona, this 4th day of March, 1974.

W. J. FURSTENAU, Clerk

By /s/ P. T. Martin
Deputy Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS M. COCKE,

Plaintiff-Appellant

v.

IRWIN S. CANTOR, et al.

Defendant-Appellees

No. 74-1997

O R D E R

Filed: 10/7/74

Before: MERRILL, HUFSTEDLER, and WALLACE, Circuit Judges. In the light of the entire record, the district court correctly determined that the complaint failed to assert a claim upon which relief could be granted.

The judgment of dismissal is affirmed.

KELLY AND CORBIN
550 West Washington
Phoenix, ARizona 85003

Attorneys for Plaintiffs,

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE his wife, Plaintiffs,	NO. C-222472
vs.	
FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants.	Filed: September 30, 1974
vs.	
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Additional Defendant on Counterclaim.	

ORDER APPROVING ACCOUNT OF COURT-APPOINTED OFFICER AND PETITION FOR APPROVAL AND APPLICATION FOR INSTRUCTIONS AND FOR DISTRIBUTION

(Assigned to Judge Cantor - Division 7)

TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, having filed its verified Account of Court-Appointed Officer; Petition for Approval and Application for Instructions and for Distribution; and pursuant thereto, the Court having issued its Order to show cause why the relief prayed for in the account and petition should not be granted and appointing the 28th day of August, 1974, at the hour of 4:00 o'clock P.M. as the place and time for hearing upon said petition;

And, on said day and time the said account and petition coming on regularly to be heard by the Court, the Petitioner TITLE INSURANCE COMPANY OF MINNESOTA and Plaintiffs appearing by their attorney, Hubert E. Kelly, the Defendant, FRANCIS M. COCKE, appearing by and through his attorney, L. Alton Riggs, Jr., and Defendant, JOAN H. COCKE, appearing by and through her attorney, Loretta Whitney, and no other party appearing in person or by their attorney, and the Court having heard the testimony and having examined the proofs offered in evidence finds that the allegations set forth in the Verified Account and Petition are true and correct and that the Court has jurisdiction to grant the relief sought in the said Verified Account and Petition;

And, the Defendant, JOAN H. COCKE, by and through her attorney, Loretta Whitney, having represented to the Court her approval of the Verified Petition and Account and for the relief therein sought;

And it appearing to the Court that TITLE INSURANCE COMPANY OF MINNESOTA, pursuant to the Writ of Assistance issued out of this Court on October 31, 1973, did proceed with the closing of the escrow theretofore known as No. 0201311-7 in accordance with the contract and escrow

instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, as modified by the Judgment dated September 27, 1972, and the Order granting the Writ of Assistance on October 31, 1973; that in connection with the closing of said escrow pursuant to the Contract and Escrow Instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, Plaintiffs have done all things thereunto required of them and did comply with the terms of said Contract and Escrow Instructions, as modified by the Judgment entered and filed by this Court on September 27, 1972 and the Order of October 31,1973 granting the Writ of Assistance; that in connection with the closing of said escrow, Title Insurance Company of Minnesota did all things thereunto commanded of it by this Court under the Writ of Assistance issued by this Court pursuant to the Order of October 31, 1973 and did close said escrow on December 20, 1973 in accordance with terms and conditions of the aforesaid Contract and Escrow Instructions, as modified, and did, on December 21, 1973, in connection therewith grant the easements provided for in said Contract and Escrow Instructions, copy of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by reference, and did convey to Plaintiffs according to their respective interests, pursuant to the Writ of Assistance and by Special Warranty Deed, a copy of which is attached hereto as Exhibit "C", the interest of the Defendant, FRANCIS M. COCKE, in and to the real property situate in Maricopa County and described therein; and that in connection with the closing of

said escrow the said TITLE INSURANCE COMPANY OF MINNESOTA, did further receive and account for the charges against and credits to the Plaintiffs as buyers, and the charges against and credits to the said FRANCIS M. COCKE and JOAN M. COCKE, as sellers, according to their respective interests and in accordance with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgment entered and filed herein on September 27, 1972 and the Order of October 31, 1973;

It further appearing to the Court that the aforesaid Contract and Escrow Instructions provided the Plaintiffs the right and privilege to prepay the purchase money mortgage given by them in connection with the closing of said escrow for and on behalf of the Defendants, FRANCIS M. COCKE and JOAN A. COCKE, at any time after January 2, 1969; that on July 1, 1974, Plaintiffs did prepay the full amount of the unpaid balance of the purchase money mortgage then due and owing, viz.: $420,238.15, plus interest in addition thereto of $13,253.51, against the interestof FRANCIS M. COCKE, the said TITLE INSURANCE COMPANY OF MINNESOTA offset $8,240.80, the shortage in closing fees and charges of the Defendant, FRANCIS M. COCKE on December 20, 1973; that as a result of said prepayment by Plaintiffs the said TITLE INSURANCE COMPANY OF MINNESOTA paid in full a mortgage due the Federal Land Bank Association in the sum of $34,802.88, on the real estate the subject of said Contract and Escrow Instructions entered into on October 9, 1968, for the purpose of clearing title for the subject property to Plaintiffs; that pursuant to the Contract and Escrow Instructions, as modified, there remains due and owing

to Arleigh H. Burton, as a result of the prepayment by Plaintiffs and for real estate commissions due pursuant to the aforesaid Contract and Escrow Instructions the sum of $17,411.91, plus interest, to July 1, 1974 of $560.06, which said TITLE INSURANCE COMPANY OF MINNESOTA applied against the interest of FRANCIS M. COCKE, the sum of $14,320.07, and against the interest of JOAN H. COCKE the sum $3,651.90, and that there now remains in the hands of the said TITLE INSURANCE COMPANY OF MINNESOTA for and on behalf of the Defendants, FRANCIS M. COCKE the sum $278,216.02 and JOAN H. COCKE, the sum $94,259.79, all pursuant to the aforesaid Contract and Escrow Instructions entered into on October 9, 1968 as modified by the Judgement entered and filed on September 27, 1972 and the Order dated October 31, 1973;

And the Defendant, FRANCIS M. COCKE, having filed in Open Court F. M. Cocke's Response to Order to Show Cause and Motion to Vacate or Set Aside Order Granting Writ of Assestance and the Writ Itself, and the Court having considered the same and all other matters and things in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED denying Defendant's FRANCIS M. COCKE'S Motion to Vacate or Set Aside Order Granting Writ of Assistance and the Writ Itself, and the Court reaffirms the Order entered on October 31, 1973 granting a Writ of Assistance, Order Requiring Compliance With Judgment Dated September 27, 1972, Or Supplemental Bill Enforcing Said Judgment And The Issuance of the Writ of Assistance on October 31, 1973; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the closing of Escrow No.

0201311-7 on December 20, 1973 by the TITLE INSURANCE COMPANY OF MINNESOTA pursuant to the Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgement entered and filed herein on September 27, 1972 and by Order of this Court on October 31, 1973, and pursuant to the Writ of Assistance issued by this Court on October 31, 1973 is approved and confirmed and that the account of the said TITLE INSURANCE COMPANY OF MINNESOTA as set forth in the Verified Petition and Account be, and it is hereby, settled and approved including, but not limited to the following:

a) The receipt of purchase money proceeds and mortgages and the application of charges and credits for and against the Plaintiffs, as buyers, and the Defendants, FRANCIS M. COCKE and JOAN H. COCKE, as sellers, according to their respective interests, in connection with the closing of the aforesaid escrow, including the disbursement of proceeds of sale in the sum of $21,210.84 to JOAN H. COCKE, on or about December 20, 1973;

b) The easements granted by the said TITLE INSURANCE COMPANY OF MINNESOTA in connection with the closing of said escrow as provided for in the Contract and Escrow Instructions entered into on October 9, 1968, copies of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by this reference;

c) The Special Warranty Deed executed by said Title Insurance Company of Minnesota, pursuant to the Writ of Assistance, a copy of which is attached hereto as Exhibit "C".

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving and settling the accept-

ance of the prepayment by Plaintiffs JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE of the full amount of the purchase money mortgage then due and owing on July 1, 1974 to Defendants, FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests, viz.: $420,238.15, plus interest of $13,253.51, and the issuance by Petitioner of satisfaction of mortgages by reason of said prepayment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving the deposit proceeds available for distribution and in the hands of Petitioner in certificates of deposits and savings accounts pending distribution of same;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that distribution be made by Petitioner of $278,216.02 to the Defendant, FRANCIS M. COCKE, and of $94,259.79 to the Defendant JOAN H. COCKE, as and for their respective remaining distributable share of the purchase money proceeds out of the Contract and Escrow Instructions dated October 9, 1968, as modified by the Judgment of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving all other acts and things done by Petitioner, TITLE INSURANCE COMPANY OF MINNESOTA on behalf of FRANCIS M. COCKE and JOAN H. COCKE in connection with the Contract and Escrow Instructions dated October 8, 1968, as modified by the Judgement of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973 and the prepayment of the purchase money mortgages received from Plaintiffs in connection therewith on September 20, 1973.

DONE IN OPEN COURT THIS 30th day of

September, 1974.

/s/ Irwin Cantor
Judge of the Superior Court

The Original of the foregoing lodged with the Court this 13 day of September, 1974.

Copies mailed this 13 day of September, 1974, to:

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